PP

v.

LIM SIEW POH

HIGH COURT MALAYA, SHAH ALAM
SOFIAN ABD RAZAK J
[CRIMINAL TRIAL NO: 45-60-2008]
27 DECEMBER 2011

CRIMINAL PROCEDURE: *Charge - Defective charge - Accused charged with trafficking in five kinds of drugs under s. 39B(1)(a) Dangerous Drugs Act 1952 - Weights of four drugs below statutory limit of offence of trafficking - Whether charge wrong in law - Whether accused entitled to acquittal - Whether prosecution proved case of trafficking of remaining drug in charge beyond reasonable doubt - Evidence Act 1950, s. 134 - Criminal Procedure Code, ss. 180(1), 182A(1)*

The accused was charged with trafficking in 62.13g heroin, 7.01g monoacetylmorphine, 6.53g cannabis, 0.19g methamphetamine and 2.01g ketamine under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('DDA'). According to the prosecution's case, a 19-member police party, acting on information received, ambushed the accused while he was sitting in his car near a petrol station. The accused was in the driver's seat with a white plastic bag ('P13') on his lap. Inside P13 was a box ('P14') which contained the heroin. The police found other drugs in the glove compartment of the car. The accused's case was that P13 belonged to a person named 'Ah Lai' who was with him in the car but who went off to see a friend while the accused waited in the car when the police arrived. The accused denied that P13 was on his lap when the police ambushed him. He said he did not know P13 contained drugs. He said he was an innocent carrier and did not attempt either to throw P13 away or to evade arrest when the police approached the car. The accused also submitted that no fingerprint analysis of P13 and P14 was done to show that he had handled them and that it was fatal to the prosecution's case that only the head of the 19-member police party was called to testify without corroboration.

A At the close of the prosecution's case the defence was called only on the charge of trafficking in 62.13g heroin. The court held that the weights of the other drugs stated in the charge fell below the respective weight limits required to constitute an offence of trafficking in those drugs. The accused was accordingly acquitted B and discharged of the alleged possession of those drugs.

Held (finding the accused guilty of trafficking in 62.13g heroin and sentencing him to death):

C **(1)** The inclusion in the charge of the other drugs which were below the threshold weight for trafficking was wrong in law. (para 45)

(2) The available evidence before the court showed the accused was fully aware of the contents in P13 and the prosecution D had succeeded in proving he had knowledge to establish *mens rea* possession. (para 59)

(3) The court found that 'Ah Lai' was a fictitious character. (para 59)

E **(4)** The discrepancies between the prosecution witnesses were minor in nature and did not affect the substratum of the prosecution's case. (para 61)

(5) The accused had failed to rebut that he was trafficking in the F heroin and failed to cast any reasonable doubt on the prosecution's case. (paras 62 & 63)

Case(s) referred to:

Aedy Osman v. PP [2011] 1 CLJ 273 FC ***(refd)***
Leow Nghee Lim v. R [1956] MLJ 28 ***(refd)***
G *Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC* ***(refd)***
PP v. Abdul Rahman Akif [2007] 4 CLJ 337 FC ***(refd)***
PP v. Hla Win [1995] 2 SLR 424 ***(refd)***
PP v. Lee Yit Weng [2011] 9 CLJ 345 HC ***(refd)***
H *PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC* ***(refd)***
PP v. Tan Ann Chye [2003] 8 CLJ 877 HC ***(refd)***
Shamsuddin Hassan & Anor v. PP [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 SC ***(refd)***
Ti Chuee Hiang v. PP [1995] 3 CLJ 1 FC ***(refd)***
I *Warner v. Metropolitan Police Commissioner [1968] 2 All ER 356* ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 180(1), 182A(1)
Dangerous Drugs Act 1952, ss. 2, 37(a), (da), 39B(1)(a), 40A
Evidence Act 1950, s. 134

For the accused - Joseph Tan; M/s Lua & Partners
For the prosecution - Tuan Mohd Mustaffa P Kunyalam DPP

Reported by Ashok Kumar

JUDGMENT

Sofian Abd Razak J:

[1] The accused stands charged as follows, namely:

Amended charge:

> Bahawa kamu pada 7hb April 2008, jam lebih kurang 6.00 pagi di kawasan kilang beralamat G 2000 Apparel Sdn Bhd, No: 36, Persiaran Industrial, Bandar Sri Damansara, didalam Daerah Petaling, di dalam Negeri Selangor Darul Eshan, telah didapati mengedar dadah berbahaya iaitu sejumlah berat 62.13 gram heroin, 7.01 Monoacetylmorphines, 6.53 gram cannabis, 0.19 gram Methampertamine dan 2.01 gram ketamine dan oleh yang demikian kamu telah melakukan kesalahan dibawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum dibawah Seksyen 39B(2) Akta yang sama.

[2] At the close of the prosecution's case, five witnesses were called to testify and the narration of their evidence are as follows, namely:

Factual Background Of Case

[3] On 6 April 2008, at about 10pm at night, SP2 ASP Norosid bin Hj Mamat, the head of the raiding party received an information from an informer, regarding a drug-trafficking syndicate operating within the vicinity of Sri Damansara. On 7 April 2008, at about 2am in the morning, SP2 gave a briefing to his officers and men with regard to an operation on information received from an informer at the Damansara Police Station. Present at the briefing were three officers including himself, ASP Loi Yew Lik and C/Insp Husni and 16 men. At the briefing it was revealed that a Chinese man in a dark Proton Wira, with registration number

unknown will be trafficking in drugs around the petrol station near a factory outlet named G 2000 Apparel Sdn Bhd in an industrial area called the Persiaran Industri Bandar Sri Damansara. The witness had identified the two officers and the 16 men who were involved in the said operation. The men were grouped into five teams and all the members of the team proceeded to the target area to make an observation and surveillance on the dark Proton Wira. At about 6am in the morning of 7 April 2008, SP2 saw a dark Proton Wira entering the front of the Shell petrol station and stopping near the factory outlet, G 2000, Apparel Sdn Bhd. The registration number of the car was WDH 3303. SP2 could not see anyone else in the car. SP2 then gave instructions to ASP Loi Yew Lik by walkie talkie for his team and SP2's team to do the blocking of the accused's car. ASP Loi Yew Lik's team blocked the front and SP2's team blocked the rear of the accused's car. After ensuring the accused's car could not move, SP2 came out of his car and proceeded to the driver's side of the door and found that the driver was a Chinese man. SP2 immediately identified himself as a police officer and as SP2 was to make an arrest, he saw one plastic bag on the lap of the Chinese man. The said plastic bag was white in colour and SP2 seized the white plastic bag before he arrested the accused and ordered him to come out of the car. The reaction of the Chinese man was one of fright and evasiveness. When SP2 opened the door of the car, it was not locked and the engine was still running.

[4] When the Chinese man was dragged out of the car, a body search did not disclose any incriminating exhibits on him. SP2 then proceeded to inspect the white plastic bag with the words 'SUNSHINE' written on it (exh. P13). In the said white plastic bag with the words written 'SUNSHINE' was a box with words written 'HAIR DRYER' (exh. P14), wherein in the said box were three big packets wrapped with transparent plastic containing powdery substance suspected to be heroin. The white plastic bag with the words written 'SUNSHINE' was not sealed or covered. When SP2 inspected the white plastic bag with the words written 'SUNSHINE' ASP Loi Yew Lik and C/Inspector Husni were present.

[5] A search as to the identity of the Chinese man revealed that his name was Lim Siew Poh. The witness could identify the Chinese man as the accused in the dock. A further search inside the car's dashboard, SP2 found one transparent plastic packet

(exh. P15) and inside it there was one small transparent plastic packet containing dried leaves suspected to be cannabis, and three transparent plastic packets suspected to contain ecstasy pills, a registration card of a car (exh. P21), a passport in the name of the accused (exh. P22) and two bank passbooks respectively, all in the name of Lim Siew Poh, (exhs. P23 and P24 respectively). SP2 said while the search on the plastic bag with the word 'SUNSHINE' was going on, the accused seemed to be nervous and in a state of fright. SP2 said he was not sure whether the light in the car was on when he opened the car door but the street lights and the light from the factory were bright. Witnesses could recognize the place of the arrest. The accused and the exhibits were taken to the Damansara Police Station. SP2 then prepared a 'Senarai Pemeriksaan' (exh. P9) signed by the accused. SP2 also prepared a 'Senarai Borang Serah Menyerah' (exh. P10). Before SP2 handed over the exhibits to the investigating officer (SP5), he weighed the drugs to ascertain the gross weight using a digital weighing machine where the gross weight of the three plastic packets containing the whitish powdery substance was 1135 grams; 1 plastic packet containing dried leaves suspected to be cannabis weighing 8.6 grams. SP2 did not weigh the ecstasy pills but the total number of pills were 100 pills. SP2 said on the way to the Balai Polis Damansara, the drugs seized were in his custody and possession and he put it on his lap. On arrival at the police station, SP2 did the counting and weighing of the exhibits and put markings on them as follows:

(a) one plastic white bag with the word written 'SUNSHINE' marked as 'A';

(b) one box with the word 'HAIR DRYER' marked as 'B';

(c) three packets of transparent plastic containing whitish powdery substance, marked B1, B2 and B3 respectively;

(d) one packet of transparent plastic bag containing dried leaves marked as 'C';

(e) three packets transparent plastic containing ecstasy pills marked as D1, D2 and D3 respectively;

(f) one transparent plastic bag containing a car registration card, a Malaysian passport, two Bank passbooks marked as E, E1, E2, E3 and E4 respectively;

(g) A Proton Wira with registration number WDH 3303 and a bunch of keys and a remote control.

[6] SP3 was the chemist who did the analysis on the drugs handed over to her by the investigating officer (SP5). SP3 received from SP5, one white plastic bag with the word written 'SUNSHINE' marked 'A', the content therein was a box with the word written 'HAIR DRYER' containing three packets marked 'B1, B2 and B3' which contained a whitish powdery substance. SP3 also received a plastic bag marked 'E' containing one packet plastic marked 'C' containing plant materials, two plastic packets marked D1 and D2 respectively containing 50 pills and 25 pills chocolate in colour and one plastic packet marked as 'D3' containing 25 pills, purple in colour. SP3 issued a Chemistry Department laboratory number *viz* (PJ) FOR 3405/08-0 marked as P11 to SP5. SP3 said that she kept the exhibits in the steel cabinet in the strongroom and she was the only one having access to the said steel cabinet. The key to the strongroom was kept by her alone.

Analysis On The Exhibits

(i) Gross weight of D1-453.54 gm and net weight was 451.15 gm;

(ii) Gross weight of D2-453.25 gm and net weight was 450.77 gm;

(iii) Gross weight of D3-230.36 gm and net weight was 228.22 gm.

(iv) Gross weight of C-9.08 gm and net weight was 2.55 gm;

(v) Gross weight of pills in plastic marked D1-16.01 gm and the net wt 15.25gm;

(vi) Net weight in plastic marked D2 - 22.98gm;

(vii) Gross weight of the purple pills in plastic marked D3 - 8.88gm and net weight 8.14gm.

[7] SP3 carried out the analysis on all the drugs sent to her and she was satisfied that the analysis on the drugs revealed that the drugs were heroin, monoacetylmorphine, methamphetamine, cannabis and ketamine respectively all of which are listed as dangerous drugs in the 1st Schedule of the DDA 1952. The witness then prepared a chemist report, marked as exh. P12.

Submission At The Close Of Prosecution's Case

Defence's Submission

[8] The learned counsel submitted that the charge against the accused was defective because it contained five different drugs and five different weights in one charge. The manner in which the five different drugs are to be proven is also different. As for the charge in respect of heroin which was under s. 39B(1)(a) of the DDA, 1952 and there is a presumption of trafficking involved but as for the other drugs due to the weight been less than the threshold amount 'no presumption is applicable except for having possession only. The defect in the charge could not be rectified by virtue of s. 422 of the CPC.

[9] The learned counsel submitted that of the three officers and 16 lower rank police personnel who were allegedly present at the scene of the crime, but only SP2, ASP Norosid was called to testify at the trial. Without calling ASP Loi Yew Lik, C/Insp Husni and Sjn Mohd Sidek to corroborate SP2's evidence it was fatal to the prosecution's case. This was particularly relevant in view of the fact that there were discrepancies with regard to the manner in which the accused was intercepted, that all the more reason ASP Loi Yew Lik ought to be called as a witness. The learned counsel also took issue on the discrepancies between the evidence of SP2 and SP5. The evidence which showed discrepancy was that according to SP2 the scene of the crime was lighted and clear but SP5 said it was dark. SP2 said there was a lamp post at the scene but SP5 said there was none.

[10] It was further submitted that according to SP2 the distance between the end of the petrol station with the factory G2000 Apparel Sdn Bhd was less than ten feet away and if the accused was driving at the speed of 30km per hour from where SP2 first saw the accused, the accused's car would have stopped in less than 3-4 minutes.

[11] With regard to the evidence that the box (exh. P14) was found on the lap of the accused, it would be foolish of him not to throw away the box if he had known the contents of the box (exh. P14) were drugs. The fact that the accused did not throw away the box (exh. P14) showed that the accused did not know the contents of exh. P14 coupled with evidence that the accused did not attempt to run away when he was arrested.

[12] The learned counsel alluded the court to the fact that there were discrepancies between the oral evidence of SP2 and the police report (exh. P20) and also with other prosecutions' witness namely SP3, SP4 and SP5. According to the police report the place of observation was at the factory G2000 Apparel Sdn Bhd and not at the Shell Petrol station. This was not mentioned in the police report regarding the observation made at the Shell Petrol station. The evidence by SP2 that he went to the scene of the crime with SP3 and SP5 was denied both of them. It was the defence's contention that the observation was not at the Shell Petrol station but in front of the factory G2000 Apparel Sdn Bhd. With regard to the police report, it was made at 9.23pm and not at 7am and hence the police report should not have been tendered as a first information report but as an arrest report.

The Defective Police Reporting System (PRS)

[13] In the PRS the report was stated as Sungai Buloh Report No: 3536-3538/08 but in the photo of the exhibits taken on the white sheet of paper it was written as Kampong Baru Subang Report No: 3536-3538/2008. The fact that the instant case has two report numbers seem to have been a mix-up of the exhibits when placed in the steel cabinet. Further apart from the signature of SP5 on the exhibits, there were no other markings such as date or the report number. The query was, whether the exhibits produced in court were the exhibits seized from the accused?

[14] There were also discrepancies in the identity of the exhibits with regard to its colour. SP2 described the drugs seized as whitish, SP4 the photographer described the drugs as orange, SP3 the chemist described it as white, SP5 the I.O described the drugs as whitish, grey and pink. The learned counsel referred to the case of *PP v. Lee Yit Weng* [2011] 9 CLJ 345 where the court held that when the drugs were seized it was white but by the time it was received by the chemist it was colourless. No evidence was led by the prosecution to explain the difference in the colour of the proscribed drug.

[15] During the cross-examination of SP5 it was alleged that SP5 could not tell where he got the exhibits from and there was also no confirmation that the exhibits were with SP5 from 14 September 2008 till 2 March 2010 a period of about two years. In evidence SP5 was alleged to have given the exhibits to

the storekeeper – SP1 – L/Kpl Dumiran on 14 September 2008. The query that the learned counsel posed were, where did he keep the exhibits and when did he take out the exhibits? The unexplained questions left a gap in the prosecution's case which relate to chain of handling of the exhibits. The learned counsel referred to the case of *Shamsuddin Hassan & Anor v. PP* [1991] 3 CLJ 2414; [1991] 1 CLJ (Rep) 428 where the court held that 'there was no explanation what PW4 did with the drugs for more than 5 hours before he handed it over to the investigating officer. We are of the view that these are serious gaps in the chain of evidence with regard to the drugs thrown out of the car and the exhibits produced in court. On this ground alone, the appellants should not have been called to enter their defence'.

[16] The learned counsel submitted that the markings on the exhibits were different in that SP5 had used a black marker to make the markings such as the date, signature and the alphabet without putting the Sungai Buloh Report No: 3536 - 3538/08. According to Inspector Nasrul, SP5 only put his marking in the form of his signature using a blue marker. SP3 in her evidence stated that the markings on the exhibit such as the date were written in black and there were two of the same signatures. The learned counsel further went on to query whether the exhibits in respect of Sungai Buloh Report 3536-3538/08 and Kampung Baru Subang Report No: 3536-3538/08 were mixed when they were kept in the steel cabinet. SP5 said he made the markings after the photographer had taken photographs of the exhibits but according to the defence, apart from his signature there were no other markings such as the Sungai Buloh Report No: 3536-3538/08.

Other Issues Raised By The Defence

[17] Although the accused was the registered owner of the car registration number WDH 3303, there was no evidence as to how long he had been using the car. Furthermore the accused was at the driver's seat only momentarily perhaps between 3-4 minutes before the police ambushed the car. The presence of 'Ah Lai' together with the accused in the car could not be discounted. The accused did not have a driving licence to drive the said car and there was a shirt near where the gear knob was. The accused was not asked by the police to wear the said shirt to ascertain whether it fitted the accused. No fingerprint analysis was done on the interior of the car and on the said shirt. The car in which the drugs were found did not fall within the meaning of the word

A 'anything whatsoever containing' and the presumption under s. 37(a) of the Act does not apply as the drug was not hid in any compartment in the car. It was incumbent for the prosecution to prove that the accused had possession, custody and control of the box, exh. P14 and knowledge of the drugs found in the box. B This was because the box was in the plastic bag tightly sealed and could not be seen with the naked eyes. The prosecution did not attempt to retrieve the fingerprint imprint from exh. P14 to show that the accused had handled exh. P14. The accused did not make any attempt to evade the arrest by running away.

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[18] The learned counsel submitted that upon the maximum evaluation of the prosecution's evidence, the prosecution had failed to prove a *prima facie* case against the accused and the accused be acquitted and discharged from the charge without D calling him to enter his defence.

Submission By The Prosecution

[19] In order to prove a *prima facie* case against the accused, the necessary ingredients relevant are as follows namely:

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(a) that the accused had possession, custody and control of the drugs;

(b) that the accused was trafficking in drugs;

F (c) that the drugs were dangerous drugs within the meaning of s. 2 of the DDA, 1952.

[20] It was the contention of the prosecution that the accused had possession of the drugs in the box, exh. P14 which was G found in the plastic bag, exh. P13. The accused was alleged to have possession of the car registration number WDH 3303 at the material time when he was arrested. When the accused was arrested, he was seated at the driver's seat with the plastic bag, exh. P15 on his lap. By virtue of this piece of evidence, it was H the contention of the prosecution that the accused also had the possession of the car registration number WDH 3303. During the surveillance conducted on the accused's car, there was no one-else in the said car. In the dashboard of the car, the police found incriminating exhibits such as the registration card of the car I registered in the accused's name exh. P21, a Malaysian passport in the accused's name and Hong Leong Bank and Public Bank savings books in the names of the accused marked as exhs. P23

and P24 respectively. The prosecution submitted that the accused's version put during the prosecution's case that the plastic bag exh. P13 containing the box exh. P14 where the drugs were found actually belonged to the accused's friend named 'Ah Lai', was rebutted by the prosecution witness that during the surveillance conducted on the said car, there was no one else in the car or no one got out of the said car except the accused who was at the wheel of the car at the time of his arrest. The version of the defence that the drugs belonged to 'Ah Lai' was a mere denial by the accused.

[21] The prosecution also submitted the plastic bag exh. P13 containing the box with the word 'Hair Dryer' marked and tendered as exh. P14 where, the contents therein were three transparent plastic packets containing whitish substance, could easily be seen by the accused who was seated at the driver's seat marked and tendered as exhs. P 14A (1-3) respectively. The plastic bag was not sealed and could have easily be seen by the accused by opening the box exh. P14. The accused must have known the existence of the plastic bag and must have had custody and control of the plastic bag containing the box and in which contained the drugs. Similarly, the police found in the dash-box a plastic packet containing dried leaves suspected to be cannabis exh. P16 and three transparent plastic packets containing ecstasy pills marked as exhs. P17A, P17B and P18A respectively. The accused must have had the control and custody of the drugs in exhs. P14A (1-3) and P17A, P17B and P18A respectively.

[22] The accused was deemed to be trafficking in dangerous drugs by virtue of the weight of heroin weighing 62.13 grams which exceeded the statutory weight for trafficking by three times and triggered the statutory presumption of trafficking under s. 37(da) of the Act.

[23] The prosecution further submitted that through the evidence of SP3 that the drugs found in the box exh. P14 were dangerous drugs listed under the 1st Schedule of the Act and defined in s. 2 of the Act as dangerous drug. The chemist report exh. P12 confirmed that the whitish substance was heroin, a dangerous drug.

[24] On the question of the credibility of SP2's evidence, it was submitted that his evidence should be accepted as having been credible unless his testimony was not inherently improbable. The

prosecution held that the evidence of SP2 was credible and there was no reason for the court to reject it. The prosecution was also of the view that no adverse inference should be drawn for calling only SP2 as the only witness from the 16 members of the raiding party. The prosecution was of the further view that s. 134 of the Evidence Act 1950 states that no particular number of witnesses shall in any case be required for the proof of any fact.

[25] On the chain of evidence regarding the movement of the drugs from the moment they were seized and tendered in court as exhibits, it was submitted that there was no break in the chain of evidence.

[26] On the legality of the charge preferred against the accused, the prosecution submitted that although the charge contained reference to other drugs which *prima facie* its net weight did not come within the statutory weight for it to tried before the High Court, nevertheless it was not fatal. There was no need for separate charges to be preferred against the accused for the other lesser amount of weight of drugs in the subordinate court. Accordingly the Act did not prevent the prosecution from preferring a charge encompassing more than one drug in a charge.

[27] On the alleged delay in making the police report and the mistake in exh. P19 with regard to the police report number, the prosecution submitted that SP2 and SP5 have given sufficient explanations with regard to the PRS system. SP5 had also admitted that it was his mistake in placing another police report namely Kg Baru Subang Report: 3536-3538/08 near the exhibits before the photographs were taken in exh. P19. The search list exh. P9 and Borang Serah Menyerah exh. P10 were consistent in the drugs listed with the exhibits tendered in court. All the markings on the exhibits were identified by SP2 and also by the chemist SP3 respectively when they were tendered in court.

[28] On the alleged difference in the colour of the drugs seized, the prosecution submitted that the chemist SP3 explained that the colour change from whitish to grey (kekelabuan) was because of the oxidation process. She further said that the plastic packet in the photo, the marking and the contents were similar within the exhibits which she received. There were also no ambiguity in the entry entered in the registration book for exhibits as it was explained by the storekeeper (SP1) and the investigating officer (SP5) in respect of the entry number ER: 168/08.

[29] On the alleged information received by SP2 prior to the arrest of the accused by the informer, s. 40A of the Act clearly protect the identity of the informer from been revealed and for the protection of the informer.

[30] The prosecution submit that they have successfully proven a *prima facie* case against the accused for the offence charged and urged the court to call the accused to enter his defence on the original charge.

Decision At The Close Of Prosecution's Case

[31] It is settled law that the court is to undertake a maximum evaluation of the prosecution's evidence and not merely to skim the surface of that evidence alone.

[32] Under s. 180(1) of the Criminal Procedure Code (hereinafter called 'the CPC') when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a *prima facie* case against the accused. The case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 has provided guidelines what the court is to take at the close of the prosecution's case which is summarized as follows:

(i) at the close of the prosecution's case, subject the evidence led by the prosecution in its totality to a maximum evaluation. Carefully scrutinize the credibility of each of the prosecution's witnesses. Take into account all the reasonable inferences that may be drawn from the evidence. If the evidence admits of two or more inferences, then draw the inference that is most favourable to the accused.

(ii) ask yourself the question, If I now called upon the accused to make his defence and he elects to remain silent am I prepared to convict him on the evidence now before me? If the answer to the question is 'Yes', then a *prima facie* case has been made out and the defence should be called. If the answer is 'No' then, a *prima facie* case has not been made out and the accused should be acquitted;

(iii) after the defence is called, the accused elects to remain silent, then convict;

(iv) after defence is called, the accused elects to give evidence, then go through the steps set out in *Mat v. PP* [1963] 1 LNS 82.

[33] The prosecution in order to prove a *prima facie* case against the accused person must prove that:

(i) the accused had possession, custody and control of the drugs;

(ii) the accused had knowledge of the drugs seized;

(iii) the accused was trafficking in dangerous drugs.

[34] To implicate the accused with a charge of trafficking in dangerous drugs, the prosecution must prove that what the accused did in this case comes within the meaning of trafficking as defined in s. 2 of the Act, 1952 which defines "trafficking" as follows:

> Unless the context otherwise requires, trafficking includes the doing any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, **transporting**, carrying, sending, delivering, procuring, supplying or distributing any dangerous drug. (emphasis added)

[35] The offending drugs in the instant case were found in the plastic bag exh. P13 in which the contents were found in the box exh. P14 respectively. One pertinent ingredient which the prosecution needed to prove was that the accused was in possession of the drugs and he was in custody or control of it, for unless he was found to be in possession or custody or control, he could not be in the position to traffic in such drugs.

[36] In *Leow Nghee Lim v. R* [1956] MLJ 28 Taylor J said at p. 28 as follows:

> Custody means having care or guardianship; goods in custody are in the care of the custodian and, by necessary implication, he is taking care of them on behalf of someone else. You cannot take care of goods unless you know where they are and have the means of exercising control over them. Custody therefore implies knowledge of the existence and whereabouts of the goods and power of control over them, not amounting to possession.

[37] Based on the facts above, the court found that the accused had custody, control and possession of the plastic bag exh. P13 which contained the box exh. P14 the contents of which were the drugs. There was ample evidence to show that the plastic bag was found on the lap of the accused. The court at this juncture

disbelieved that the defence's case as it was put to the prosecution witnesses, that the plastic bag exhibit in which the drugs were found belonged to Ah Lai. Hence the accused was caught red handed by SP2 and had the physical custody and control of the incriminating drugs.

[38] Even without the aid of the presumptions on s. 37(da) of the Act, there were ample evidence to show that the accused had physical custody, control and possession of the plastic bag exhibit P13 and the box exh. P14 and its contents exhs. P14A (1-3) respectively. The accused must have known the contents in the plastic bag exh. P13 at the time of his arrest as the said plastic bag was not sealed or covered and it did not require much effort to uncover the contents in exh. P14 which contained heroin. The accused had all the time to see and to ascertain the contents of exhs. P14A (1-3) respectively. To my mind the cumulative conduct in putting the plastic bag exh. P13 on his lap which was not sealed and covered and easily opened leads to an irresistible inference of knowledge and hence the prosecution has established a strong *prima facie* case of actual possession.

[39] The court in this respect also made a finding that in view of the overwhelming evidence of direct physical *mens rea* possession of the drugs heroin in the box exh. P14 by the accused, would invoke the presumption under s. 37(da) in view of the fact that the weight of the drug heroin of 62.13 grams which exceeded three times the threshold weight of 15 grams for the presumption of trafficking and could not possibly be meant for one's own use but for trafficking.

[40] On the argument that the charge exh. P1(A) was defective as it includes other drugs, of which the weight being lesser than the minimum threshold weight namely monoacetylmorphine weighing 7.01 gm, cannabis weighing 0.19 gm, and ketamine weighing 2.01 gm, I am of the view that the prosecution should have preferred separate charges against the accused at the subordinate court for the other drugs and then transferred the case to the High Court to be tried together with the case before the High Court. This is because in the instant case in the charge it does not refer to the relevant provision of the Act under which the accused was charged for possession of the other drugs. That is to say that in exh. P1(A) the accused was charged for trafficking in dangerous drugs which would refer to only heroin because its net weight exceeded the threshold weight for the

presumption of trafficking. The other drugs do not attract the presumption of trafficking in view of its weight. The case cited by the prosecution, *PP v. Tan Ann Chye* [2003] 8 CLJ 877, and agreed with the view of the learned judge that there is nothing under the Act which may prevent the public prosecutor from charging a person for trafficking in more than one dangerous drugs in one charge. In the instant case the other dangerous drugs are not offences involving trafficking, so it was wrong for the prosecution to have lumped the other drugs in one charge. On that basis, I ruled that the charge against the accused before the High Court should only refer to trafficking in dangerous drugs namely 62.13 grams of heroin.

[41] At this juncture, the court was of the view that the prosecution had successfully proven, despite the allegations by the defence that there were ambiguity in the drugs tendered in court with regard to the description of the colour, that the drugs seized from the accused were the drugs tendered in court. The court accepted the prosecution's witness SP3's explanations namely the chemist who testified that the change in the colour was because of the process of oxidation. For the defence to dispute SP3, the chemist's evidence, they must call for rebuttal witness during the defence case. The court had no reasons not to accept SP3's evidence on the analysis of the drugs. All the markings on the drugs were identified by SP2, SP3 and SP5 respectively when tendered in court. There was no break in the movement of the drugs from the time they were seized up to the time they were sent to the chemist for analysis and then taken back by the investigating officer and tendered in court during the trial. There was no break in the chain of evidence with regard to the movement of the drugs seized, analysed by the chemist and tendered in court.

[42] The court accepted the explanation by SP5 that he made a mistake by putting a wrong police report number namely that of Kg Baru Subang Rpt: 333536-538/08 instead of Sg. Buloh Report No: 3536-3538/08 when taking photographs in exh. P19. The court accepted the evidence by SP5 that the drugs photographed in exh. P19 were the drugs seized from the accused in the said car in relation to Sg. Buloh Report No: 3536-3538/08.

[43] The other issue which the learned counsel took the prosecution to task was the fact that of the 16 members of the raiding party who laid ambush and arrested the accused, only SP2 was called to testify. The learned counsel further argued that the prosecution should have called the other members of the raiding party such as C/Inspector Loi Yew Lik who was involved in intercepting the accused car. The court was of the view that the prosecution's case was not dependant on the number of witnesses called but by the weight of such evidence given. In s. 134 of the Evidence Act 1950 where it states that 'no particular number of witnesses shall in any case be required for the proof of any fact'. In this respect the court was of the view it was the prerogatives of the prosecution to call who and how many witnesses to prove their case. In *Ti Chuee Hiang v. PP* [1995] 3 CLJ 1 the court held that while the prosecution has a complete discretion as to the choice of witnesses to be called at the trial, it also has the duty to call all necessary witnesses essential to the unfolding of the narrative of the prosecution case to establish proof against the accused beyond all reasonable doubt.

[44] On the issue that the accused was alleged not to be in possession of a valid driving licence, therefore someone must have driven the car for him and that someone was 'Ah Lai'. The court was of the view that not in possession of a valid driving licence does not necessarily mean that the accused could not drive, as what the prosecution witness SP2 had observed was that the said car was driven by the accused and no one else when it was intercepted.

[45] In conclusion, the court held that in the light of the principles set out in the authorities referred to and reproduced above, the court was satisfied that on the totality of the evidence before the court, the prosecution had succeeded in proving a *prima facie* case against the accused. The court called upon the accused to enter his defence on charge of trafficking heroin weighing 62.13 grams only. The court found that inclusion of the other drugs which were below the threshold weight for trafficking in the charge exh. P1 was wrong in law and the court therefore acquitted and discharged the accused for the alleged possession of 7.01 grams of monoacetylmorphine, 6.53 grams of cannabis, 0.19 grams of methamphetamine, and 2.01 grams of ketamine. The amended charge for trafficking in heroin was read and explained to the accused and marked as exh. P30 the accused pleaded not

guilty to the charge and claimed trial. The three options were explained to the accused and the accused elected to give evidence on oath from the witness box.

The Defence Case

[46] The crux of the defence case as narrated by the accused was that he came down from Bukit Mertajam to Kuala Lumpur with a friend named 'Ah Lai', whose car had problem. In view that the accused too wanted to renew his passport, 'Ah Lai' told him that his passport could be renewed in Kuala Lumpur which was faster and more convenient. As a result thereof the accused had agreed to follow 'Ah Lai' to Kuala Lumpur. After getting his leave from his employer, the accused called 'Ah Lai's' mobile number 013-2113399. At about 8pm 'Ah Lai' came to the house carrying one plastic bag exh. P13. The accused then brought along two bank passbooks, passports and the registration card for the car. The accused then gave the car key to 'Ah Lai' to drive as he did not have a driving licence. 'Ah Lai' then opened the car door and put the plastic bag exh. P13 on the floor at the rear passenger seat behind the driver's seat. The accused said he did not know the contents of the plastic bag exh. P13.

[47] On the way to Kuala Lumpur from Penang, 'Ah Lai' received phone calls and he answered the calls at the rest area along the Plus Highway. 'Ah Lai' had received about five or six calls. At about 5pm in the afternoon they arrived in Kuala Lumpur and stopped at a Shell petrol station. At the material time the accused had come out to fill-up petrol in his car and at the same time the accused saw 'Ah Lai' making phone calls. Thereafter 'Ah Lai' drove the said car for about five minutes at the speed of 30kmh. 'Ah Lai' then stopped the car and told the accused that he wanted to see a friend and had asked the accused to sit at the driver seat. At the material time 'Ah Lai' took out his shirt and put it in front in between the driver's seat.

[48] About 30 minutes later, the car window on the driver's side was knocked and because it was already quite dark, the accused opened the car window a little and a man spoke in Hokkien dialect said 'opened the car door, government officer'. The accused was then dragged out of the car and at that time nothing had dropped from the accused's lap, and at the same time two cars came to block the accused's car, one in front and the other at the rear. The accused was taken to the police station and was

told that the police found drugs in the car. The accused told the police that the drugs did not belong to him but it belonged to 'Ah Lai' who had gone out to look for his friend.

Submission At The Close Of Defence Case

[49] The learned counsel submitted that the plastic bag exh. P13 was not found on the accused's lap but behind the driver's seat, and it belongs to 'Ah Lai'. The accused said that the police officer who arrested him was not SP2 as he could not speak the Hokkien dialect. The officer who arrested him was C/Inspector Loi Yew Lik and the place where the accused was arrested was in front of Kilang G2000 Apparel Sdn Bhd was doubtful as the place was quite dark.

[50] On the question of whether 'Ah Lai' was a fictitious character, the accused had mentioned Ah Lai's' name during the prosecution's case and had informed the police of 'Ah Lai's' mobile number although this denied by the police. The accused alleged that 'Ah Lai' had made five to six phone calls which incidentally SP2 had also received about five or six phone calls. How did the informer know the progress of the accused's trip from Penang to Kuala Lumpur?. It was reasonable to suggest at the material time that 'Ah Lai' was with the accused and therefore was not a fictitious character.

[51] The learned counsel further submitted that the accused had no knowledge of the contents in the plastic bag exh. P13 because it did not belong to him but it belonged to 'Ah Lai'. It was 'Ah Lai' who brought the plastic bag exhibit P13 and put it in the car. Exhibit P13 was tightly sealed and could not be seen with the naked eyes and there was no evidence that the accused had ever opened the plastic bag exh. P13. There were no fingerprints uplifting done on the plastic bag or the box exh. P14. The averment that the plastic bag exh. P13 was on the lap of the accused was not substantiated by other witnesses. Of the two versions, whether the accused knew of the contents in exh. P13 and consequently the contents of exh. P14 respectively, it was argued that the defence version was more probable, in that it was not logical for the accused to have placed the plastic bag exh. P13 on his lap during the journey from Penang to Kuala Lumpur, a distance of approximately 400 km as it would be inconvenient and

not safe to drive. Why would the accused place the plastic bag exh. P13 on his lap when he could have put it down on the front passenger's seat next to the driver's seat?

[52] The accused was an innocent carrier who came from Butterworth to Kuala Lumpur just to renew his passport and incidentally 'Ah Lai's' car was not in a proper working condition. The accused was alleged to have no driving licence to drive the car. The defence questioned the motive, as to why considering the journey was about 400 km, the police did not stop the car and arrest him. Could it be because 'Ah Lai' was with the accused?

[53] No evidence was shown that the accused attempted to evade arrest. The accused was not asked to wear the shirt found in the car which purportedly belonged to 'Ah Lai' and whether it fitted the accused. There was no attempt by the accused to throw away the plastic bag from the car or at least remove the plastic bag to the next seat, either in front or at the rear.

[54] In conclusion, it was submitted that the accused had successfully created a reasonable doubt on the prosecution's case and the prosecution had failed to prove a case against the accused beyond reasonable doubt. Hence the accused should be acquitted and discharged from the charge of trafficking in dangerous drugs namely, heroin.

The Submission By The Prosecution

[55] The learned deputy submitted that it was crystal clear the accused's evidence was a bare denial that the drugs found in the car belonged to him, but instead pushed the blame on 'Ah Lai'. The prosecution on the other hand submitted that there was no one else in the car when the car was intercepted or before the car was intercepted. SP2 in his evidence confirmed this fact. The accused other than just mentioning the name 'Ah Lai' did not know any personal details of 'Ah Lai' such as his address. Reference to the case of *Aedy Osman v. PP* [2011] 1 CLJ 273 (Rayuan Jenayah 05-108- 2009 where the Federal Court affirmed the finding of the trial judge said in the following words namely 'Kassim' bukanlah seorang yang sebenar dan 'Kassim' ialah rekaan OKT bagi melepaskan diri daripada pertuduhan yang dikemukakan terhadap nya'. The defence has to rebut the presumption under s. 37(da) of the Act in order to rebut the presumption of

trafficking in dangerous drugs, which accordingly the defence has failed to rebut the said presumption. The court in analysing the evidence in totality must find that the defence has failed to cast any doubt on the prosecution case and the prosecution has successfully proven its case against the accused beyond reasonable doubt and consequentially find the accused guilty as per the charge and thus convicted him of the offence charged.

The Findings Of The Court

[56] The law at the close of the defence case is well established in the case of *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311, where Mohammed Azmi SCJ held as follows:

> It is a well established principle of Malaysian criminal law that the general burden of proof lies throughout the trial on the prosecution to prove beyond reasonable doubt the guilt of the accused for the offence with which he is charged. There is no similar burden placed on the accused to prove his innocence. He is presumed innocent until proven guilty. To earn an acquittal, his duty is merely to cast a reasonable doubt in the prosecution case. In the course of the prosecution case, the prosecution case, prosecution may of course rely on available presumptions to prove one or more of the essential ingredients of the charge. When that occurs, the particular burden of proof as opposed to the general burden shifts to the defence to rebut such presumptions on the balance of probabilities which from the defence point of view is heavier than the burden of casting a reasonable doubt, but it is certainly lighter than the burden of the prosecution to prove beyond reasonable doubt ... if defence is called, the duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt.

[57] Section 182A(1) of the CPC provides that at the conclusion of the trial, the court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.

Maximum Evaluation Of The Evidence

[58] It is an accepted principle of law that the defence's evidence needs to be weighed with the rest of the evidence presented by the prosecution by referring to the principles as stated in the case of *Mohamad Radhi Yaakob (supra)*. In this respect, the duty of the

defence is to cast a reasonable doubt in the prosecution's case. The accused admitted having possession of the plastic bag marked and tendered as exh. P13 but denied that he had knowledge of the contents in exh. P13 namely exhs. P14A(1-3) in the box marked as exh. P14. In this respect the duty of the defence is to cast a reasonable doubt in the prosecution's case. In evaluating the defence's evidence, the accused admitted that the plastic bag was in his car but it was put in at the back of the driver's seat by 'Ah Lai' when he came in to drive the accused's car. The accused had denied knowledge of the contents of exh. P13 to contain drugs. In other words the accused claimed to be an innocent carrier of the plastic bag exh. P13 and its contents containing drugs. The court would like to refer to the case of *PP v. Hla Win* [1995] 2 SLR 424 where the court held that *inter alia* 'where ignorance is bliss,' tis folly to be wise' To argue away inconvenient truth is a human failing. If a person deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know' he is taken to know'. In this respect, it was no answer to say that the accused did not know the contents in exh. P13. The accused must have known the contents of exhs. P13. There was no bag, big or small in the said car purportedly belonging to 'Ah Lai' and even if 'Ah Lai' had left the car in search of his friend, presumably he would not bring along his bag containing his clothes. It would be strange that 'Ah Lai' who had travelled from Penang to Kuala Lumpur did not bring some clothes, except the one left behind in between the front seat near the gear knob. As for the accused who also did not bring any clothes, he said that he would buy them once he reached Kuala Lumpur. The question for the court's determination was whether 'Ah Lai' was a fictitious character who allegedly had left the plastic bag exh. P14 in the accused's car.

[59] The court having given a maximum evaluation on the whole of the evidence by the prosecution and the defences found that 'Ah Lai' was a fictitious character who did not exist. In the final analysis of the available evidence before the court, showed the accused was fully aware of the contents in the plastic bag exh. P13. The court found that the prosecution had succeeded in proving that the accused had knowledge to establish *mens rea* possession. The issue of knowledge necessary to establish possession was considered in *PP v. Abdul Rahman Akif* [2007] 4 CLJ 337 where the Federal Court cited and referred to the case of *Warner v. Metropolitan Police Commissioner* [1968] 2 All ER 356,

where Lord Morris in his judgment had this to say 'if, however someone deliberately so assumes control of some package or container, then I would think that he is in possession of it. If he deliberately so assumes control knowing that it has contents, he would also be in possession of the contents. I cannot think that it would be rational to hold that someone who is in possession of a box which he knows to have things in it, is in possession of the box but not in possession of the things in it. If he had been misinformed or misled as to the nature of the contents, or if he had made a wrong surmise as to them, it seems to me that he would nevertheless be in possession of them'.

[60] There was no evidence to show the context to be otherwise, that he was transporting and carrying drugs, all the while knowing what he was doing. Knowingly, transporting the drugs with him from one place to another and knowing the nature of the drugs as being dangerous drugs, to wit heroin as defined in s. 2 of the Act.

[61] The court accepted the version of the prosecution as to how the accused came to be in possession of the plastic bag exh. P13 found on the accused's lap. The court found that the discrepancies between the prosecution witnesses were minor in nature and it did not affect the substratum of the prosecution's case.

[62] In conclusion, the court having carefully scrutinized the evidence by the prosecution and the defence in totality and subjecting it to a maximum evaluation, was satisfied that the accused had *mens rea* possession of the contents therein being heroin a dangerous drug as defined in s. 2 of the Act. In view of the weight of the drug heroin being 62.13 gms, which exceeded the statutory minimum weight, the court found that the accused has failed to rebut that he was also trafficking in the said drug.

[63] The court found that the accused had failed to cast any reasonable doubt on the prosecution case and the prosecution had proven its case beyond reasonable doubt. The court found the accused guilty of possession and trafficking in heroin as per the amended charge in exh. P30. The court hereby sentenced the accused to death by hanging.